STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	
	)	Docket No. 00-0259
Petition for expedited approval of implementation of a market-based alternative tariff, to become effective on or before May 1, 2000, pursuant to Article IX and Section 16-112 of the Public Utilities Act	)	

APPLICATION FOR REHEARING OF ENRON ENERGY SERVICES, INC.

Christopher J. Townsend
David I. Fein
Christopher N. Skey
PIPER MARBURY RUDNICK & WOLFE
203 N. LaSalle Street
Suite 1800
Chicago, Illinois 60601-1293

Attorneys For Enron Energy Services, Inc.

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APPLICATION FOR REHEARING OF ENRON ENERGY SERVICES, INC.

Enron Energy Services, Inc. ("Enron"), by its attorneys Piper Marbury Rudnick & Wolfe, pursuant to Section 200.880 of the Rules of Practice ("Rules") of the Illinois Commerce Commission ("Commission"), hereby submits its Application for Rehearing of the Interim Order entered by the Commission on April 27, 2000 ("Order") regarding the petition ("Petition") for approval of a market-based alternative to the Neutral Fact Finder ("NFF") filed by Commonwealth Edison Company ("Edison") pursuant to Section 16-112(a) and Article IX of the Public Utilities Act (the "Act").

The Commission took less than twenty (20) business days to conduct a proceeding that will fundamentally reshape the Illinois retail electric market. In its haste to replace the NFF, the Commission entered an Order that is not supported by record evidence, endorsing an ill-conceived, unproven, untested alternative. No party was given the opportunity to cross-examine Edison's witness or present testimony in opposition to the Petition. Since the findings of the Commission in the instant proceeding were not supported by any evidence, much less substantial

evidence on the record, the Order cannot withstand appellate review. The manner in which the instant proceeding was conducted violated parties' due process rights, and the Commission's Order is contrary to the Commission's Rules, the Act, and Illinois law. Rather than taking a leap of faith and endorsing an unproven alternative, Enron respectfully requests that the Commission grant rehearing to properly address Edison's Petition.

Enron requests expedited treatment of the instant Application for Rehearing. Consistent with the Commission's Rules, the Commission can rule prior to the expiration of twenty (20) days from the date of receipt to either grant or deny an application for rehearing. (*See* 83 Ill. Admin. Code Section 200.880.) Failure to afford expedited treatment to Enron's Application for Rehearing would be inconsistent with the manner in which the Commission conducted the instant proceeding. Indeed, failure to afford expedited treatment of Enron's Application for Rehearing could result in the Commission taking more time to deal with the instant pleading than it took to dispose of Edison's entire Petition.

Also, expedited treatment is necessary to secure parties' rights to a meaningful appeal of the Commission's Order. Before a party may seek appellate review of a Commission Order, an application for rehearing must be filed and disposed of by the Commission. (*See* 220 ILCS 5/10-113.) In the event that the Commission were to deny rehearing, Enron retains a right to obtain Appellate Court review. (*See* 220 ILCS 5/10-113; 83 Ill. Admin. Code 200.890.) Delay by the Commission will prejudice Enron's position with respect to appeal, since Edison is moving forward to implement its proposal.

I.

EXECUTIVE SUMMARY:

THE COMMISSION SHOULD GRANT REHEARING AND REJECT EDISON'S PROPOSED ALTERNATIVE TO THE NEUTRAL FACT-FINDER PROCESS

The Order entered by the Commission in the instant proceeding has reshaped the face of competition in the Edison service territory and, if not stayed or reversed, will do so for the foreseeable future. It appears that the Commission's dislike for the current NFF process caused the Commission to conduct these proceedings in violation of the Commission's own Rules, the Act, Illinois Constitution and the United States Constitution, to the prejudice of Enron and other parties. (*See* 220 ILCS 5/10-201(e)(iv)(C), -201(e)(iv)(D).)

If provided with an opportunity to conduct proper discovery and present evidence, Enron would show that Edison's proposal would be harmful to consumers and competitors. Indeed, it appears that manipulation of the markets that Edison's proposal relies upon is likely to occur because the markets represented by Altrade and Bloomberg are so thinly traded. Rather than promoting efficient competition or providing customers with any additional opportunities to save money, the Commission's Order unless it is revised on rehearing will increase customer confusion, limit customer choice and retard the development of the retail electric market in Illinois.

The Order entered by the Commission implements an **inappropriate** replacement for the current NFF process that would harm Enron, its customers and many other Illinois consumers.

For the following reasons, Enron respectfully requests that the Commission grant rehearing and enter an Order rejecting Edison's proposed alternative to the NFF process:

- The procedures that led to the Commission entering the Order failed to afford parties constitutionally protected due process rights.
- The Order is inconsistent with Illinois law. Specifically, the Order disregards the requirements of Article IX of the Act, the hearing and notice requirements in the Act, and Illinois case law regarding procedural due process.
- The Order is contrary to the Commission's Rules. Since no proper foundation existed for the Commission to waive its procedural rules, improperly treating the instant proceeding as a "paper hearing" violated parties right to a hearing and cross-examination.
- The Order is not supported by substantial evidence in the record. The parties to the proceeding explained how Edison's proposal would allow for market manipulation and explained that the markets relied upon do not reflect current Illinois electric prices.
- The Order fails to promote competition. The Order will increase customer confusion and the failure to adopt a statewide solution will retard competition.
- The Commission entered an Order that is contrary to the Customer Choice and Rate Relief Act of 1997 (the "Customer Choice Act"). A component of the alternative endorsed in the Order is improperly based upon historic data; customers cannot buy in any of the markets that are used; and the alternative fails to provide market values for all of the necessary years.
- The Commission failed to require Edison to satisfy its burden of proof.
- The Commission may lose any future jurisdiction over Edison's proposal.

II.

PROCEDURAL HISTORY

The instant proceeding was initiated on Friday, March 31, 2000, by Edison filing its Petition with the Chief Clerk of the Commission. The Petition was filed pursuant to Section 16-112 and Article IX of the Act. (*See* Petition at 1.) Section 16-112 of the Act provides:

> The market value to be used in the calculation of transition charges as defined in Section 16-102 shall be determined in accordance with either (i) a tariff that has been filed by the electric utility with the Commission **pursuant to Article IX** of this Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy.

(*See* 220 ILCS 5/16-112(a).) (Emphasis added.) Therefore, this proceeding is being conducted pursuant to Article IX, and specifically, Section 9-201, of the Act. Section 9-201 of the Act provides:

> Unless the Commission otherwise orders, and except as otherwise provided in this Section, **no change shall be made by any public utility in any rate** or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, **except after 45 days' notice** to the Commission and to the public as herein provided. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect, and by publication in a newspaper of general circulation or such other notice to persons affected by such change as may be prescribed by rule of the Commission. The Commission, for good cause shown, may allow changes without requiring the 45 days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(220 ILCS 5/9-201.) (Emphasis added.) In its Petition, Edison requested that Rider PPO-MI replace its then-existing Rider PPO-NFF. Edison's request to discontinue Rider PPO-NFF

requires that the instant proceeding be conducted pursuant to Section 8-508 of the Act. Section 8-508 of the Act provides:

> Except as provided in Section 12-306, no public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission, except in case of assignment, transfer, lease or sale of the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property to any political subdivision or municipal corporation of this State.

(220 ILCS 5/8-508.) Before authorizing a utility to discontinue the offering of a rate, the Commission is required to conduct a hearing. Section 8-508 of the Act further provides:

> The Commission, **after a hearing** upon its own motion or upon petition of any public utility, shall have power by order to authorize or require any public utility to **curtail or discontinue service** to individual customers or classes thereof, or for specific purposes or uses, and otherwise to regulate the furnishing of service, provided that preference for service shall be given to those customers serving essential human needs and governmental agencies performing law enforcement functions, whenever and to the extent such action is required by the convenience and necessity of the public during time of war, invasion, insurrection or martial law, or by reason of a catastrophe, emergency, or shortage of fuel, supplies or equipment employed or service furnished by such public utility; provided, however, that an interim order, effective for a period not exceeding 15 days, may be made without a hearing if the circumstances do not reasonably permit the holding of a hearing.

(220 ILCS 5/8-508.) (Emphasis added.)

Edison requested that the Commission implement an expedited schedule which contemplated that after its March 31, 2000 filing, all interventions would be made by April 10, 2000; a status conference would be held on April 13, 2000; a hearing, if any, would be held on April 17, 2000; a proposed order entered on Friday, April 21, 2000; a brief on exceptions filed on Monday, April 24, 2000 and a Final Order issued by the Commission on April 27, 2000. (*See* Edison Petition at 2.) Edison submitted the detailed testimony of three (3) witnesses plus a draft order with its initiating petition. No supporting workpapers were furnished.

On April 5, 2000, the Hearing Examiner directed that all parties file their petitions for leave to intervene and any objections to the proposed Edison schedule by April 10, 2000. The Commission Staff ("Staff"), Enron and other parties filed their objections on April 10, 2000, requesting that Edison's schedule be rejected and a reasonable schedule accommodating discovery, preparation and filing of direct and rebuttal testimony, cross-examination of witnesses and briefing be established. (*See* Staff Response at 3; Enron Objection at 1; IIEC Objection to Proposed Schedule at 2-3.)

On April 13, 2000, a status conference in this proceeding was held. Enron and other parties asked for a schedule that would provide a reasonable opportunity for full and complete discovery, preparation and filing of responsive testimony, cross-examination of witnesses, and preparation and filing of briefs. (*See* Transcript of April 13, 2000, ICC Docket 00-0259). Following the status conference, the Hearing Examiner (who had been directed by the Commission to develop a schedule which would enable the Commission to enter a final order in this proceeding on April 27, 2000) over the objection of Enron, IIEC and others, issued a ruling that this proceeding would be conducted as a paper hearing. (*See* Notice of Hearing Examiner's Scheduling Ruling, April 13, 2000.) The Hearing Examiner directed the parties to file written comments and supporting affidavits on April 18, 2000. The Hearing Examiner scheduled issuance of a Proposed Order no later than April 24, 2000. (*See id.*) Briefs on Exceptions were to be filed by 3:00 p.m. the very next day. (*See id.*) Reply Briefs on Exception were to be file a mere nineteen (19) hours later. (*See id.*)

On April 18, 2000, the Staff filed the prepared testimony and supporting exhibits of two (2) witnesses. Enron timely filed its Objection and Verified Comments, objecting to the schedule and noting for the record its inability to investigate Edison's proposal or properly

present its case. (*See generally* Objection and Verified Comments of Enron.) All other parties, in compliance with the Hearing Examiner's directive, filed comments and, in some instances, an affidavit. On April 20, 2000, IIEC served on the parties and the Commission a Motion seeking to modify the schedule, or in the alternative, to stay the instant proceeding, so that discovery could be conducted on the Staff testimony, responsive testimony prepared and filed, cross-examination of Staff witnesses conducted and briefs prepared and filed. (*See* IIEC Motion For Modification of Schedule and/or Stay of the Proceedings at 1-2.) In addition, IIEC once more sought the opportunity to conduct reasonable discovery, prepare and file testimony, and conduct cross-examination and prepare and file briefs in response to the pre-filed testimony and exhibits of Edison. (*See id.*)

On April 20, 2000, the Hearing Examiner issued a ruling revising the schedule. The Proposed Order was to be issued on Good Friday, April 21, 2000. (*See* Notice of Hearing Examiner's Revised Scheduling Ruling, April 20, 2000.) Briefs on Exceptions were to be prepared over Easter weekend and filed on Monday, April 24, 2000 by 4:00 p.m. (*See id.*) Reply Briefs on Exceptions were due a mere twenty (20) hours later, at 12:00 p.m. on April 25, 2000. (*See id.*) Pursuant to the revised schedule, the Hearing Examiner issued a Proposed Order at approximately 3:30 p.m. on April 21, 2000. Pursuant to the schedule, Enron timely submitted a Brief on Exceptions and a Reply Brief on Exceptions, objecting to the schedule and revised schedule at each step.

After briefly discussing the substance of the petition, but not the parties' objections to the schedule at three (3) open meetings, the Commission entered its Order on April 27, 2000.

III.

THE ORDER ENTERED BY THE COMMISSION IS INCONSISTENT WITH ILLINOIS LAW

The Order entered by the Commission violates the ratemaking provisions of Article IX of the Act, the service obligation and conditions imposed upon public utilities by Article VIII of the Act, and the Administrative Procedure Act ("APA"), and improperly brushed aside parties' due process objections. The manner in which the instant proceeding was conducted did not allow for the Commission to be fully informed and have a full record upon which to deliberate. As the Attorney General explained, the result of the improper procedure is that the Order is void. (*See* Attorney General Brief on Exceptions at 10.)

A. THE ORDER DISREGARDS THE REQUIREMENTS OF ARTICLE IX OF THE ACT

Edison's petition was filed pursuant to Section 16-112(a) of the Act as well as Article IX of the Act. (*See* Petition at 1.) By failing to hold a hearing, the procedure employed by the Commission violated the express terms of Article IX of the Act.

In all tariff filings under Section 9-201 of the Act, the Commission has the discretion to pursue one of **two** alternatives. (*See* 220 ILCS 5/9-201.) Under the **first** option, the Commission can decide not to conduct a hearing and allow the tariff to go into effect. In these circumstances, no finding need be made by the Commission that the tariffs are just and reasonable. (*See City of Galesburg v. Illinois Commerce Comm'n,* 47 Ill. App. 3d 499, 362 N.E.2d 78 (3rd Dist. 1977).) Under the **second** option, the Commission can decide that the tariff will not go into effect until a hearing is held. The tariff is then suspended and an investigation into its propriety is undertaken in a hearing conducted pursuant to Section 9-201 of the Act and

according to the procedural requirements of Section 10-103 of the Act. (*See* 220 ILCS 5/9-201; 10-103.)

In the instant proceeding, the Commission chose the second option and ordered that a hearing should be held. By exercising its discretion as it did, the Commission conceded that a "just and reasonable" finding was needed pursuant to Section 9-201 of the Act. Significantly, although Edison did not request a finding that its proposed Rider PPO-MI was just and reasonable, the Commission nonetheless made such a finding. (*See* Order at 36.) The Commission's finding resolves any doubt that might have existed regarding whether the instant proceeding was being conducted under the second option outlined in Section 9-201.

However, contrary to the requirements of Section 9-201, no hearing was ever held. The parties to the instant proceeding were virtually unanimous in criticizing the procedure as failing to provide an opportunity for parties to conduct discovery, cross-examine witnesses or present competing viewpoints. (*See generally* Enron Brief on Exceptions, AG Brief on Exceptions; Central Illinois Light Company Comments; City Comments; CMS Brief on Exceptions; IIEC Brief on Exceptions; MidAmerican Brief on Exceptions; Midwest Independent Power Suppliers Coordination Group Comments; Sieben Brief on Exceptions; Staff Comments.) The procedures adopted in the instant proceeding did not allow for **any** meaningful discovery, and did not provide for **any** hearings, **any** initial briefs or **any** reply briefs.

Contrary to Edison's assertions, no party suggested that "several rounds of discovery, several rounds of briefs, and trial-type evidentiary hearings" were required to analyze Edison's proposal. (*See* Edison Brief on Exceptions, Appendix A at 2.) The parties merely requested that the Commission use its standard procedures to evaluate a proposal that could significantly impact the electric markets; the same procedures the Commission used last year when it

investigated and rejected Edison's proposal to utilize the CINergy index. (*See generally* Order dated August 24, 1999, *Commonwealth Edison Company Petition for Appeal of an Alternative Methodology for Calculating Market Values*, ICC Docket No. 99-0171.)

The Commission must grant rehearing and conduct a hearing that affords parties the due process right if the Commission is going to make a finding that Edison's proposed tariff is just and reasonable. Otherwise, the Commission's Order cannot withstand appellate review.

B. EDISON FAILED TO PROVIDE PROPER NOTICE

Edison has failed to provide appropriate notice of its proposed change in rates. Therefore, the Commission did not have the authority to allow the new rate PPO (NFF) to go into effect.

Section 9-201 of the Act, provides in pertinent part:

> Unless the Commission otherwise orders, and except as otherwise provided in this Section, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, or classification or service, or in any privilege or facility, except after **45 days' notice to the Commission and to the public as herein provided.**

(220 ILCS 5/9-201(a).) (Emphasis added.) Section 9-201 of the Act also require publication of notice in a newspaper or as otherwise required by Commission rule. (*See id.*) Since the instant proceeding could change an existing rate or tariff, Edison was required to provide the 45-day notice and publish notice of proposed change in rates. Edison did neither.

Where statutory notice, hearing and evidentiary requirements are not followed, the Commission loses its jurisdiction to act and any order it enters under such circumstances, is void. (*See Commonwealth Edison Company v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 899, 536 N.E.2d 724. (1st Dist. 1988), *appeal denied* 126 Ill.2d 557, 541 N.E.2d 1105.)

Enron respectfully requests that the Commission grant rehearing and enter an Order rejecting Edison's proposed tariff for failure to comply with the requisite notice requirements in the Act.

C. THE INSTANT PROCEEDING IS A CONTESTED CASE AND REQUIRES A HEARING

Contrary to Edison's assertions, the instant proceeding cannot be considered anything other than a contested case. (*See* 5 ILCS 100/1-30. *See also* 83 Ill. Adm. Code 200.40) Contested cases include "complaint cases initiated pursuant to any section of the Act, investigative proceedings, and ratemaking cases." (83 Ill. Adm. Code 200.40.)

The Commission itself acknowledged that the instant proceeding was a contested case and governed by the *ex parte* rules when the Commission requested that parties consider waiving the application of the *ex parte* rules. Similarly, Edison **admitted** that the instant proceeding was a contested case when it requested that parties stipulate to the waiver of the application of the *ex parte* communication rules in the instant proceeding. (*See* Edison Stipulation of the Parties (proposed), dated April 7, 2000.) The *ex parte* rules **only** apply in contested cases. Pursuant to the Administrative Procedure Act, after notice of hearing in a contested case, *ex parte* communications are prohibited. (*See* 5 ILCS 100/10-60.) Similarly, the Commission's Rules prohibit *ex parte* communications in all contested cases. (*See* 83 Ill. Adm. Code 200.710.) In contested cases, both the Commission's Rules and the APA require all parties to agree in a written stipulation to waive the application of the *ex parte* rules. (*See* 83 Ill. Adm. Code 200.710(a). *See also* 5 ILCS 100/10-70.)

Incredibly, Edison asserts that the instant proceeding should not be considered a contested case since Rider PPO is an "optional" rate. (*See* Edison Reply Brief on Exceptions at 9.) The fact that Rider PPO is an optional rate has **no** bearing on whether the instant proceeding

is a contested case. Edison has failed to cite any relevant rule, statute, or any case law to support this absurd argument. According to Edison's misguided "logic," since all of Edison's delivery services tariffs are "optional," the Edison delivery service tariff proceedings in Docket No. 99-0117 would not have been a contested case, but rather a rulemaking. Just as Edison's delivery services tariff proceeding was a contested case, so is the instant proceeding.

Enron respectfully requests that the Commission grant rehearing to properly conduct the instant proceeding as a contested case consistent with the Commission's Rules and the APA.

D. A HEARING IS REQUIRED BEFORE EDISON CAN ABANDON RIDER PPO - NFF

The Order allows Edison to abandon and discontinue the offering of Rider PPO-NFF. Significantly, the Commission entered such an Order without conduct a hearing. In so doing, the Commission's Order violates Section 8-508 of the Act. (*See* 220 ILCS 5/8-508.)

In pertinent part, Section 8-508 of the Act provides:

> [N]o public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission . . .. The Commission, **after a hearing** upon its own motion or upon petition of any public utility, shall have power by order to authorize or require any public utility to curtail or discontinue service to individual customers or classes thereof, or for specific purposes or uses, and otherwise to regulate the furnishing of service . . ..

(*See id.*) (Emphasis added.)

The Act requires that a hearing be conducted before Edison is allowed to abandon Rider PPO-NFF. Enron respectfully requests that the Commission grant rehearing so that the required hearing can be held to determine whether Edison should be allowed to abandon Rider PPO-NFF.

E. PARTIES MUST BE GIVEN A MEANINGFUL OPPORTUNITY TO BE HEARD

Due process requires not only the technical opportunity to be heard, but also the **opportunity to be heard at a meaningful time and in meaningful manner.** (*See Petersen v. Chicago Plan Comm'n*, 302 Ill. App. 3d 461, 466, 707 N.E.2d 150, 154 (1st Dist. 1998).) As predicted in Enron's Reply Brief on Exceptions, Edison waited until the submission of its Reply Brief on Exceptions to provide its purported legal authority to authorize the bizarre and unprecedented procedures utilized in the instant proceeding. Through procedural maneuvering Edison has attempted to prevent any party from responding to its suspect assertions. As a result, the Commission should discount Edison's assertions.

The Illinois Supreme Court has concluded that "[m]anifestly **there is no hearing when the party** does not know what evidence is offered or considered, and **is not given an opportunity to test, explain or refute."** (*See Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill.2d 367, 404, 603 N.E.2d 489, 507 (1992) (emphasis in original), citing *Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913).) Furthermore, administrative hearings must be conducted in a manner appropriate to the nature of the issues being considered. (*See Lakeland Construction Co. v. Department of Revenue*, 62 Ill. App. 3d 1036, 1040, 379 N.E.2d 859, 862 (2nd Dist. 1978) (citations omitted).) The issues considered in the instant proceeding involve changing the underpinnings of the only retail electric market that has shown any possibility of developing in Illinois. Moreover, given that the Commission, in rejecting a similar proposal from Edison last summer, previously afforded parties a meaningful opportunity to conduct discovery, submit multiple rounds of testimony, cross-examine witnesses, and submit initial and reply briefs in a similar proceeding, there was no credible reason for the Commission to dispense with a similar procedural schedule in the instant proceeding. (*See BPPI*

v. Illinois Commerce Comm'n, 136 Ill. 2d 192, 228, 555 N.E.2d 693, 709 (1989) (Commission decisions entitled to less deference when they drastically depart from past practice.))

Pursuant to both the APA and constitutional principles of procedural due process, in contested cases before the Commission, parties are entitled to a hearing, an opportunity to present evidence and the ability to cross-examine adverse witnesses. (*See Abrahamson v. Illinois Dep't of Prof. Regulation,* 153 Ill.2d 76, 92, 606 N.E.2d 1111, 1120 (1992); *People ex rel. Ill. Commerce Comm'n v. Operator Communication, Inc.*, 281 Ill. App. 3d 297, 301-03, 666 N.E.2d 830, 832-34 (1st Dist.), *appeal denied* 168 Ill.2d 623, 671 N.E.2d 742 (1996); *Stillo v. State Retirement Sys.*, 305 Ill. App. 3d 1003, 1009, 714 N.E.2d 11, 16 (1st Dist. 1999).) Due process requires not only the technical opportunity to be heard, but also the opportunity to be heard at a meaningful time and in meaningful manner. (*See Petersen,* 302 Ill. App. 3d at 466.)

There is no valid basis to deny due process to the parties to the instant proceeding. Given the procedures employed, the Commission's Order is void and will be reversed on appeal, if nccessary. As a result, the Commission should grant rehearing and afford parties the necessary procedural due process to enable the Commission to enter a legally sustainable order.

F. WORKSHOPS ARE NOT A REPLACEMENT FOR HEARINGS

Both Edison and the Commission appear to recognize that they must try to reach outside the confines of the instant proceeding to find support for Edison's proposal, looking instead to purported discussions in workshops, roundtable discussions, and secret responses by Edison to unauthorized data requests. (*See* Edison Brief on Exceptions at 8; Edison Brief on Exceptions, Appendix A at 2. *See also* Concurring Opinion of Chairman Richard L. Mathias.) However, as Enron, the Attorney General and IIEC have explained fully, workshops are not a substitute for hearings. (*See* Enron Reply Brief on Exceptions at 7; Objection and Verified Comments of

Enron at 18; Attorney General Reply Brief on Exceptions at 2; IIEC Objection at 3.) The Commission should grant rehearing to allow parties to properly adduce evidence and cross-examine witnesses.

Edison would have the Commission believe that a series of informal workshops substitutes for the procedural safeguards required by due process. (*See* Edison Reply Brief on Exceptions at 2–4.) However, workshops do not have the same protections as hearings. (*See* Enron Reply Brief on Exceptions at 7; IIEC Objection at 3.) For instance, parties participating in workshops are not under oath, and no transcript or other record is maintained. No party has the right to cross-examine other parties. Parties are not necessarily represented by counsel during the workshop process.

Participation in workshops is voluntary and has never been utilized to forgo parties' rights if not present. Participation in, or lack of participation in workshops, and consensus reached or lack of consensus reached in a workshop, should not prejudice any party, nor should it deprive any party of a fair and impartial hearing with adequate time to prepare and present an appropriate case. Further, the unsworn assertions by Edison employees in workshops are even less credible than the unsubstantiated assertions in its testimony.

Moreover, no evidence was presented regarding the content of the workshop or precisely which parties participated to **any** degree. The Commission blindly has relied upon Edison's implication that the workshop process was either a fair or productive process. The position of Staff, Enron, IIEC, the City of Chicago, and the Illinois Attorney General all illustrate that the workshop process was **not** viewed as being successful.

As explained by IIEC, "if parties perceive their participation in workshops held by the Commission will ultimately be detrimental to the establishment of a fair and appropriate

litigation schedule, in the event those parties cannot come to agreement with the utilities putting forward positions in those workshops, they will simply reconsider their participation in future workshops." (*See* IIEC Objection to Proposed Schedule at 3.) A failure to maintain the distinction between informal workshops and on-the-record hearings would undermine the legitimacy of the Commission's decision-making process, would be a significant departure from the Commission's historic practice, and would constitute reversible error. (*See BPPI v. Illinois Commerce Comm'n,* 136 Ill.2d at 228.)

Enron respectfully requests that the Commission grant rehearing and conduct an appropriate hearing in order to avoid undermining the legitimacy of the Commission's decision-making process and to enable the Commission to enter an Order that would constitute reversible error.

G. EDISON FAILED TO CITE ANY RELEVANT CASE LAW

Consistent with Edison's failure to recognize other parties' rights to respond to Edison's assertions, Edison waited until its Reply Brief on Exceptions to address for the first time the numerous due process concerns raised early and often by Enron, Staff and the other parties to the instant proceeding. Such new arguments are untimely, since Edison has been on notice of the procedural concerns since before the pre-hearing conference that was held on April 13, 2000. While the Commission might have been swayed by Edison's unquestioned assertions, now that the Commission properly can evaluate their validity, the Commission must conclude that there is no support for this unprecedented and unfair procedure.

Even the case law cited by Edison in its Brief on Exception fails to support the assertion that the procedural schedule is consistent with the Act, APA, the Commission's Rules, or notions of procedural due process. In fact, Edison fails to cite to **any** Illinois cases or **any** Commission

Order where this issue has been addressed. The cases cited by Edison do not even address issues related to procedural due process in ratemaking proceedings.

For example, in asserting that procedural due process should not be afforded to its ratepayers, Edison fails to cite to any Illinois cases or decisions of the Commission. Instead, Edison resorts to reliance upon irrelevant decisions from Pennsylvania and ancient orders from the New York public service commission. Edison's misplaced reliance upon *Consolidated Edison of New York, Inc.*, 29 PUR 3d 542, 543 (N.Y.P.S.C. 1959) illustrates how far Edison had to stretch for this proposition. *Consolidated Edison* was merely a two-page report that rejected an application for reconsideration of an order from a New York agency regarding a claim that conjunctional billing was discriminatory.

Edison's reliance on *Glade Park East Homeowners Assn. v. Pennsylvania Pub. Util. Comm'n*, 628 A.2d 468 (Pa. Comm. Ct. 1993) is equally misplaced. Unlike the instant proceeding, in which Edison is requesting a change in rates, the Court in *Glade* expressly noted that the case was not about rates but rather over a boundary line between the service territories of two utilities. (*See Glade*, 628 A.2d at 475.) As a result of the resolution of the dispute, the condominium owners were forced to take service from a different utility that just happened to charge higher rates. The Pennsylvania court's decision has no relevance to the instant proceeding.

Edison also improperly suggests that the Commission can rely upon *Ten Ten Lincoln Place, Inc. v. Consolidated Edison Co.*, 69 PUR (NS) 108, 110 (N.Y.P.S.C. 1947) to deny parties' due process rights. In *Ten Ten*, the dispute was over the service classification that prevented an apartment building owner from submetering electricity and reselling the electricity to its tenants; there was no dispute about rates. This circa 1947 pronouncement has no binding

effect upon the New York agency that originally made it and certainly does not justify the Commission's improper procedures in the instant proceeding.

Additionally, Edison's argument about ratepayers having no due process protection misses the point. Enron is not simply an Edison ratepayer, but also a certified ARES. As such, it has an interest in minimizing the customer confusion that would result if Edison's alternative were to remain in place. Customer confusion has the potential to destroy this nascent market. Further, as a certified ARES, Enron also has a direct financial interest in the instant proceeding since Enron's rates and product offerings must compete against Edison's PPO tariff. Enron has sold products to customers in Edison's service territory based upon the assumption that the PPO rate would be set by the NFF process. Allowing Edison to abandon the PPO (NFF) and use an alternative that increases the PPO rate for the summer of 2000 and allows Edison to manipulate the PPO in future years is tantamount to enabling Edison to manipulate the market in which Enron must compete.

As a result of Enron's financial interest as a certified ARES, Enron must be afforded due process protections. (*See Balmoral Racing Club v. Illinois Racing Board*, 151 Ill.2d 367, 603 N.E.2d 489 (1992).) In *Balmoral*, the Court recognized that the denial of a racing license affected the profitability of the Balmoral racetrack and concluded that such property rights must be afforded due process rights. (*See Balmoral*, 151 Ill. 2d at 406.) Similarly, the instant proceeding will impact Enron's profitability to operate as a certified (i.e. licensed) ARES. The Commission recognized Enron's right to due process in the instant proceeding when it granted Enron's petition for leave to intervene. (*See* Tr. at 28.) In granting Enron's petition, the Commission granted Enron the right to become a party; to examine and cross-examine

witnesses; and to adduce evidence. (*See* Petition for Leave to Intervene of Enron at 2.) Enron is entitled to due process protections.

Edison's reliance upon *Commonwealth Edison Co.*, 84 PUR 4th 469 (1987) as support for the procedural schedule utilized in the instant proceeding is grossly misplaced. Edison asserts that in that proceeding the Commission recognized that a negotiation process that began forty-five (45) days before the filing of a petition for a rate increase by Edison was sufficient to withstand any due process challenge. (*See* Edison Reply Brief on Exceptions at 7-8.) However, Edison improperly mischaracterizes the basis for the Commission's finding in *Edison*. Contrary to Edison's assertions, the negotiation process that precipitated the filing in *Edison* was only one of numerous factors that lead the Commission to its conclusion. The Commission noted the following additional factors:

- The negotiations occurred during the pendency of a docketed proceeding;
- Most of the major parties participated in the negotiation process;
- During the negotiation process, Edison made substantial financial and operating information available to the participants;
- Discovery was both extensive and liberal;
- Depositions were ordered and taken;
- Meetings took place;
- Most parties had more than one counsel;
- Many expert witnesses were presented;
- Extensive cross-examination, unrestricted by pre-determined time constraints was permitted;
- Daily transcripts of each day's hearings were available to the parties the next day; and
- Initial and Reply Briefs were simultaneously filed.

(See *Commonwealth Edison Co.*, 84 PUR 4th at 493-494.) In *Edison*, there obviously were a host of additional factors that led to the Commission's determination that the expedited schedule did not violate the Act or the constitutional mandates for due process and fair hearing. Indeed, the list of factors considered in *Edison* is striking when viewed against the procedure in the instant proceeding. In stark contrast to Commission practice and the Commission's conclusion in

Edison, the workshops occurred prior to the initiation of any docketed proceeding and the schedule utilized in the instant proceeding:

- Did **not** allow for any meaningful discovery, and Edison **failed** to file any workpapers to support its proposal;
- Did **not** allow for depositions;
- Did **not** provide for the filing of any testimony by any party except Edison;
- Provided **insufficient time** for the parties to prepare and present a comprehensive response to Edison's proposal;
- Did **not** permit interested parties to respond by testimony to one another's testimony;
- Did **not** provide for cross-examination of Edison's witnesses;
- Did **not** even provide for initial or reply briefs;
- Did **not** allow sufficient time for the preparation of briefs on exceptions and reply briefs on exceptions;
- Did **not** permit adequate time for deliberation by the Hearing Examiner;
- Essentially forced the Commission to adopt in total the proposal contained in Edison's petition; and
- Did **not** permit adequate time for deliberation by the members of the Commission.

The schedule in the instant proceeding failed to provide parties with any meaningful opportunity to be heard. In fact, contrary to the Act and the APA, there was no hearing at all. Accordingly, Enron respectfully requests that the Commission grant rehearing and conduct the instant proceeding pursuant to an appropriate schedule that affords Enron and other parties the requisite procedural due process.

IV.

THE ORDER IS CONTRARY TO THE COMMISSION'S RULES

In its haste to try to find a replacement for the neutral fact finder, the Commission trampled its own Rules. The schedule adopted for the instant proceeding was unworkable and unlike any in the history of Commission practice, especially for a proceeding of such magnitude. As the Order recognized, Edison filed its petition on Friday, March 31, 2000, seeking an order by April 27, 2000, less than **twenty** (20) business days after the filing. (*See* Order at 31-32.) While the requested time was unreasonable on its face, the procedural problems were compounded by

the manner in which the proceeding was conducted. The Commission should grant rehearing and conduct the instant proceeding in a manner that is consistent with the Commission's Rules.

A. TREATING INSTANT PROCEEDING AS A "PAPER HEARING" VIOLATED THE COMMISSION'S RULES

After receiving responses and replies to Edison's scheduling proposal, the Hearing Examiner adopted a "paper hearings" procedure for the instant proceeding. (*See* Notice of Hearing Examiner's Scheduling Ruling, April 13, 2000.) The Commission's Rules do provide for a "paper hearing" in which material issues are resolved on the basis of written pleadings and submissions verified by affidavit. (*See* 83 Ill. Adm. Code 200.525(a).) However, such a "paper hearing" requires a stipulation to the waiver of any rights that parties have to a hearing. (*See id.*) All parties, the Staff and the Hearing Examiner must approve this stipulation. (*See* 83 Ill. Adm. Code 200.525(b).)

As properly recognized by the Attorney General, while the issue of paper hearings was discussed at a pre-hearing conference on April 13, 2000, all parties did **not** agree to waive any rights to a hearing. (*See* Attorney General Comments at 6.) Therefore, the Hearing Examiner's Scheduling Ruling, that did not provide for a hearing, but rather responsive comments, created an illegal "paper hearing" as defined in the Commission's Rules. (*See* 83 Ill. Adm. Code 200.525(a). *See also* Attorney General Comments at 6.) By inappropriately failing to acknowledge this fundamental procedural defect, the Order violated both the Act and the Commission's Rules. (*See* 220 ILCS 5/10-201(e)(ii); 83 Ill. Adm. Code 220.525(a).)

Enron respectfully requests that the Commission grant rehearing and conduct a proper hearing that complies with the Commission's Rules regarding paper hearings.